Supreme Court, U.S.
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No. 93-1105

In The

Supreme Court of the United States

October Term 1993

COLORADO DEPARTMENT OF HEALTH
AND MILDRED SIMMONS

Petitioners,

v.

BERNADETTE BAUMAN, MARION SMITH,
AND ANTOINETTE STAJDUHAR,

Respondents.

**On Petition For A Writ Of Certiorari
To The Colorado Supreme Court**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Colorado Court of Appeals erred when it held the state's notice of claim statute does not bar the federal claims brought in the state court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 1

The Colorado Court of Appeal's holding that the state notice of claim statute does not bar federal age discrimination claims brought in state court is consistent with the Supremacy Clause of the U.S. Constitution and existing case law 1

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Bauman, et al. v. Colo. Dep't of Health, 857 P.2d 499 (Colo. App. 1993), *cert. denied* Sept. 7, 1993, *petition for cert. filed*, 62 U.S.L.W. 3493 (Jan. 3, 1994) (No. 93-1105) 1, 2, 6

Felder v. Casey, 487 U.S. 131 (1988) 3, 4, 5, 6

Free v. Bland, 369 U.S. 663 (1962) 3

Howlett v. Rose, 496 U.S. 356 (1990) 2, 6

Martinez v. California, 444 U.S. 277 (1980) 6

Mondou v. New York, N.H. & H.R. Co., 223 U.S. 1 (1912) 3

Mucci v. Falcon School Dist. No. 49, 655 P.2d 422 (Colo. App. 1982) 6

Testa v. Katt, 330 U.S. 386 (1947) 2

Williams v. Speedster, Inc., 175 Colo. 73, 485 P.2d 728 (1971) 6

Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820 (1990) 5

STATUTES AND RULES

42 U.S.C. § 1983 ..... 4, 5

§ 24-10-102, C.R.S. (1988 Repl. Vol. 10A) 7

§ 24-10-109, C.R.S. (1988 Repl. Vol. 10A) 1, 7

SUP. CT. R. 10 7

STATEMENT OF THE CASE

Petitioner Colorado Department of Health seeks review of the Colorado Court of Appeal's decision in *Bauman, et al. v. Colo. Dep't of Health*, 857 P.2d 499 (Colo. App. 1993), *cert. denied* Sept. 7, 1993, *petition for cert. filed*, 62 U.S.L.W. 3493 (Jan. 3, 1994) (No. 93-1105), which reversed the trial court's dismissal of the respondents' federal age discrimination claims. It is respondents' position that the court of appeals did not err when it held that the state's notice of claim statute did not apply to the federal claims in reversing the trial court. For the purposes of this brief, the Statement of the Case as found in the Petition for Writ of Certiorari, except for the statements that the trial court and the court of appeals found that the respondents' claims were jurisdictionally barred (which are not reflected in the record), are accepted as true.

REASONS FOR DENYING THE WRIT

The Colorado Court of Appeal's holding that the state notice of claim statute does not bar federal age discrimination claims brought in state court is consistent with the Supremacy Clause of the U.S. Constitution and existing case law.

In petitioning this Court for certiorari, Petitioner Colorado Department of Health ("Department") argues that the holding of the Colorado Court of Appeals violated the principles of federalism when it held that the state notice provision contained in § 24-10-109 C.R.S. (1988 Repl. Vol. 10A), did not bar the federal age discrimination claims brought by the plaintiffs in the state district

court. *Bauman, et al. v. Colo. Dep't of Health, supra.* In doing so, the Department misapprehends the principles underlying the Supremacy Clause, the nature of concurrent jurisdiction, and the applicable state law.

Controversies involving the power and the duty of state courts to enforce federal laws were resolved in the 1860's. *Testa v. Katt,* 330 U.S. 386 (1947). The fundamental issues raised and resolved by the war were addressed by the Supreme Court in that period and the principle that the federal law is the supreme law of the land which states are obligated to enforce has been ingrained since that time. *Id.* at 389.

The petitioner does not challenge that the state court has concurrent jurisdiction over the age discrimination claims. Rather, the argument being made by the petitioner appears to be that this jurisdiction is somehow contingent upon the state claims. However, the jurisdiction of the federal claims arise independently of the state claims. As stated in *Howlett v. Rose,* 496 U.S. 356 (1990):

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum – although both might well be true – *but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature.* The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.

496 U.S. at 367 (emphasis added).

Further, " '[t]he existence of the jurisdiction creates an implication of duty to exercise it.' " *Id.* at 369-370 (quoting *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1 (1912)). *See also Testa v. Katt, supra* (to deny jurisdiction of a federal claim, even if the claim is in conflict with state policy, violates the Supremacy Clause).

Felder v. Casey, 487 U.S. 131 (1988) (hereinafter "*Felder*"), addressed the conflict of state notice of claim statutes with federal substantive law and held that the state statute must yield to the federal law. "Under the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.' " 487 U.S. at 138 (quoting *Free v. Bland*, 369 U.S. 663 (1962)).

The issue decided by the state court of appeals was phrased in *Felder* as follows:

> The question before us today, therefore, is essentially one of pre-emption: is the application of the State's notice-of-claim provision to [federal age discrimination] actions brought in state courts consistent with the goals of the federal civil rights laws, or does the enforcement of such a requirement instead " 'stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' "?

Id. at 138.

In reaching its holding that the notice of claim statute could not be applied to a federal claim, the Court in *Felder* stressed the fact that if such a provision should be

applied, the result would be outcome-dependent upon whether a case was filed in state or federal court. The *Felder* Court explained its rationale as follows:

> These [lower federal] courts have reasoned that, unlike the lack of statutes of limitations in the federal civil rights laws, the absence of any notice-of-claim provision is not a deficiency requiring the importation of such statutes into the federal civil rights scheme. Because statutes of limitation are among the universally familiar aspects of litigation considered indispensable to any scheme of justice, it is entirely reasonable to assume that Congress did not intend to create a right enforceable in perpetuity. Notice-of-claim provisions, by contrast, are neither universally familiar nor in any sense indispensable prerequisites to litigation, and there is thus no reason to suppose that Congress intended federal courts to apply such rules, which "significantly inhibit the ability to bring federal actions." 239 U.S. App. D.C., at 354, 742 F.2d, at 1507.

> While we fully agree with this near-unanimous conclusion of the federal courts, that judgment is not dispositive here, where the question is not one of adoption but of pre-emption. Nevertheless, this determination that notice-of-claim statutes are inapplicable to federal-court § 1983 litigation informs our analysis in two crucial respects. First, it demonstrates that the application of the notice requirement burdens the exercise of the federal right by forcing civil rights victims who seek redress in state courts to comply with a requirement that is entirely absent from civil rights litigation in federal courts. This burden, as we explain below, is inconsistent in both design and effect with the compensatory

> aims of the federal civil rights laws. Second, it reveals that the enforcement of such statutes in § 1983 actions brought in state court will frequently and predictably produce different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court. *States may not apply such an outcome-determinative law when entertaining substantive federal rights in their courts.*

Id. at 140-141 (emphasis added).

Although *Felder* was addressing a § 1983 civil rights claim, its holding is applicable here where the claims were brought under the Federal Age Discrimination in Employment Act. *See Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990).

Felder also addressed and dismissed the argument raised in the Petition for Writ of Certiorari that the notice of claim provision constitutes a "neutral" state rule which the state may apply. It states:

> This burdening of a federal right, moreover, is not the natural or permissible consequence of an otherwise neutral, uniformly applicable state rule. Although it is true that the notice-of-claim statute does not discriminate between state and federal causes of action against local governments, the fact remains that the law's protection extends only to governmental defendants and thus conditions the right to bring suit against the very persons and entities Congress intended to subject to liability. . . . On the contrary, the notice-of-claim provision is imposed only upon a specific class of plaintiffs – those who sue governmental defendants – and, as we have seen, is firmly rooted in policies very much

> related to, and to a large extent directly contrary to, the substantive cause of action provided those plaintiffs. *This defendant-specific focus of the notice requirement serves to distinguish it, rather starkly, from rules uniformly applicable to all suits,* such as rules governing service of process or substitution of parties, which respondents cite as examples of procedural requirements that penalize noncompliance through dismissal.

Id. at 144-145 (emphasis added).

In its discussion relating to the principle being argued in the Petition for Writ of Certiorari that a state can refuse jurisdiction and is not required to "create" a court, the Supreme Court in *Howlett* reaffirmed its position in *Felder*:

> In *Felder v. Casey*, we . . . held that a Wisconsin notice-of-claim statute that effectively shortened the statute of limitations and imposed an exhaustion requirement on claims against public agencies and employees was pre-empted insofar as it was applied to § 1983 actions . . . . We concluded: "The decision to subject state subdivisions to liability for violations of federal rights . . . was a choice that Congress, not the Wisconsin Legislature, made, and it is a decision that the State has no authority to override."

496 U.S. at 377 (relying upon and quoting *Martinez v. California*, 444 U.S. 277 (1980)).

Further, the basic principle of federalism applied by the *Bauman* court is consistent with earlier Colorado appellate cases. *Williams v. Speedster, Inc.*, 175 Colo. 73, 485 P.2d 728 (1971); *Mucci v. Falcon School Dist. No. 49*, 655 P.2d 422 (Colo. App. 1982).

Finally, contrary to the Department's assertions, the statute itself does not provide that the notice provision is jurisdictional as to claims brought pursuant to federal law. The statute states that "[c]ompliance with the provisions of the section shall be a jurisdictional prerequisite to any article *brought under provisions of this article* . . . " § 24-10-109(1) (emphasis added). The provisions of that article apply to claims that had historically been barred by the doctrine of sovereign immunity. § 24-10-102, C.R.S. (1988 Repl. Vol. 10A). Federal causes of action do not fall within this category of claims.

CONCLUSION

As discussed *supra*, the decision for which petitioner seeks review by this Court is founded upon well established principles enunciated in a long line of cases. Further, the Colorado state appellate courts have consistently held these basic tenets of law to be applicable and its decisions are not in conflict with this Court. *See* SUP. CT. R. 10.

For the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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March 4, 1994